

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JIMMY MITCHELL,

Petitioner,

vs.

GREG SMITH, et al.,

Respondents.

Case No. 3:09-CV-00453-LRH-(VPC)

ORDER

Before the court are the amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#9) and respondents' motion to dismiss (#16). The court finds that petitioner has not exhausted all of his grounds for relief in the state courts, and the court grants the motion to dismiss (#16) in part.

After a jury trial in the Eighth Judicial District Court of the State of Nevada, petitioner was convicted of sale of a controlled substance and his third offense of possession of a controlled substance with intent to sell. Ex. 25 (#16-25). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 37 (#17-5).

Petitioner then filed a post-conviction petition for a writ of habeas corpus in the state district court. Ex. 41 (#17-9). The district court denied the petition. Ex. 45 (#17-13). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 59 (#17-27).

Petitioner then commenced this action. The court dismissed ground 4 of the amended petition (#9) before directing respondents to respond. Order (#10).

1 Respondents argue that petitioner has not exhausted his available remedies in state court for
2 grounds 1, 3, and 4. Before a federal court may consider a petition for a writ of habeas corpus, the
3 petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a
4 ground for relief, a petitioner must fairly present that ground to the state's highest court, describing
5 the operative facts and legal theory, and give that court the opportunity to address and resolve the
6 ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam); Anderson v. Harless, 459
7 U.S. 4, 6 (1982).

8 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state
9 remedies only if he characterized the claims he raised in state proceedings specifically as federal
10 claims. In short, the petitioner must have either referenced specific provisions of the federal
11 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.
12 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law that
13 applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153, 1158
14 (9th Cir. 2003) (en banc). “The mere similarity between a claim of state and federal error is
15 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles,
16 such as due process, equal protection, and the right to a fair trial, are insufficient to establish
17 exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

18 In ground 1, Petitioner claims that counsel provided ineffective assistance because counsel
19 did not investigate supporting facts and did not communicate with petitioner. In his state habeas
20 corpus petition, petitioner raised a claim that counsel did not investigate, did not let petitioner know
21 what was occurring, and suffered from a conflict of interest. Ex. 41, p. 8 (#17-9, p. 9). However,
22 Petitioner did not allege the specific facts that he alleges in this action. Furthermore, Respondents
23 correctly argue that petitioner did not present in his opening brief to the Nevada Supreme Court the
24 facts that he presents in the amended petition (#9). See Ex. 54 (#17-22). Ground 1 is unexhausted.

25 Ground 3 has two claims. In the first paragraph, Petitioner claims that the trial court gave
26 the wrong instruction regarding the presumption of innocence. In the second paragraph, Petitioner
27 claims that the state did not prove every material element of the crime charged and that the jury
28 consisted of all white people except for one black person. Respondents correctly argue that

1 petitioner did not present the claims in the second paragraph to the Nevada Supreme Court, either
2 on direct appeal or on the state habeas corpus appeal. See Ex. 35 (#17-3), Ex. 54 (#17-22). The
3 second paragraph of ground 3 is unexhausted.

4 Respondents argument that ground 4 is unexhausted is moot because the court has already
5 dismissed it. Order (#10).

6 The amended petition (#9) is mixed, containing both claims exhausted in state court and
7 claims not exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S. 509,
8 521-22 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Petitioner may voluntarily
9 dismiss the unexhausted grounds 1 and 3 and proceed with the remaining grounds, he may
10 voluntarily dismiss this action without prejudice while he returns to state court to exhaust grounds 1
11 and 3, or he may move to stay this action while he returns to state court to exhaust grounds 1 and 3.
12 If petitioner chooses the last option, he must show that he has “good cause for his failure to exhaust,
13 his unexhausted claims are potentially meritorious, and there is no indication that the petitioner
14 engaged in intentionally dilatory litigation tactics.” Rhines v. Weber, 544 U.S. 269, 278 (2005).

15 Respondents also argue that all grounds are conclusory. The argument is moot with respect
16 to ground 4 because the court has already dismissed it. The argument is moot with respect to
17 grounds 1 and 3 because they are unexhausted, and petitioner either will need to dismiss them or
18 will need to return to state court to litigate them. Ground 2 is a claim that petitioner’s right to a
19 speedy trial was violated. In his direct appeal, petitioner presented enough information for the
20 Nevada Supreme Court to rule on the merits of this claim. See Ex. 37, pp. 1-2 (#17-5, pp. 2-3). If
21 petitioner elects to continue with this action, the issue for this court would be whether that decision
22 was contrary to, or an unreasonable application of, clearly established federal law as determined by
23 the Supreme Court of the United States. See 28 U.S.C. § 2254(d)(1). The court will not dismiss
24 ground 2.

25 Finally, respondents argue that the court should dismiss this action pursuant to LSR 2-2
26 because petitioner has been released from prison on parole but has not submitted a notice of his new
27 address. Respondents have provided that address in their certificate of service of the motion to
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1 dismiss (#16). Dismissal of the action because petitioner did not submit a notice would be a
2 needless formality.

3 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#16) is **GRANTED** in
4 part with respect to grounds 1 and 3.

5 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date of entry
6 of this order to do one of the following: (1) inform this court in a sworn declaration that he wishes
7 to dismiss grounds 1 and 3 of his amended petition (#9), and proceed only on the remaining grounds
8 for relief, (2) inform this court in a sworn declaration that he wishes to dismiss his amended petition
9 (#9) to return to state court to exhaust his state remedies with respect to the claims set out in
10 grounds 1 and 3 of his amended petition (#9), or (3) move to stay this action while he returns to
11 state court to exhaust his state remedies with respect to the claims set out in grounds 1 and 3 of his
12 amended petition (#9). Failure to comply will result in the dismissal of this action.

13 IT IS FURTHER ORDERED that if petitioner elects to dismiss the aforementioned grounds
14 of his amended petition (#9) and proceed on the remaining grounds, respondents shall file and serve
15 an answer or other response to the remaining grounds within forty-five (45) days after petitioner
16 serves his declaration dismissing those grounds. If respondents file and serve an answer, it shall
17 comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts.

18 IT IS FURTHER ORDERED that if respondents file and serve an answer, petitioner shall
19 have forty-five (45) days from the date on which the answer is served to file and serve a reply.

20 DATED this 8th day of April, 2010

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24 LARRY R. HICKS
25 UNITED STATES DISTRICT JUDGE
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